

		1 <b>FILED</b> <b>CLERK</b>
<b>UNITED STATES DISTRICT COURT</b> <b>EASTERN DISTRICT OF NEW YORK</b>		11/12/2021 10:40 am
- - - - - X :		<b>U.S. DISTRICT COURT</b> <b>EASTERN DISTRICT OF NEW YORK</b> <b>LONG ISLAND OFFICE</b>
<b>UNITED STATES OF AMERICA</b>		<b>13-CR-0607 (JFB)</b>
-against- :		
<b>PHILLIP KENNER,</b>		<b>United States Courthouse</b> <b>Central Islip, New York</b>
<b>Defendant.</b>		<b>June 22, 2017</b> <b>1:25 p.m.</b>
- - - - - X		
<b>TRANSCRIPT OF STATUS CONFERENCE</b> <b>BEFORE THE HONORABLE JOSEPH F. BIANCO</b> <b>UNITED STATES DISTRICT JUDGE</b>		
<b>APPEARANCES:</b>		
<b>For the Government:</b>	<b>BRIDGET M. ROHDE</b> <b>United States Attorney</b> <b>100 Federal Plaza</b> <b>Central Islip, New York 11722</b> <b>BY: SARITHA KOMATIREDDY</b> <b>MATTHEW HAGGANS</b> <b>Assistant United States Attorneys</b>	
<b>For the Defendant:</b>	<b>JESSE SIEGEL, ESQ.</b>	
<b>Court Reporter:</b>	<b>Perry Auerbach</b> <b>100 Federal Plaza</b> <b>Central Islip, New York 11722</b> <b>(631) 712-6103</b>	
<b>Proceedings recorded by mechanical stenography.</b> <b>Transcript produced by computer.</b>		

1 THE CLERK: Criminal cause for oral argument in  
2 13-CR-607, the United States of America against Phillip  
3 Kenner. Counsel please state your appearances.

4 MS. KOMATIREDDY: Good afternoon, your Honor.  
5 Saritha Komatireddy and Matthew Haggans for the United  
6 States along, joined by Special Agent Matt Galioto of the  
7 FBI and Special Agent Josh Green for the IRS.

8 THE COURT: Okay. Good afternoon.

9 MR. SIEGEL: Good afternoon, your Honor, Jesse  
10 Seigel for Mr. Kenner.

11 THE COURT: Good afternoon. Mr. Kenner is  
12 present as well.

13 The Court scheduled this for argument on the  
14 pending post-trial motions that have been filed by  
15 Mr. Kenner. And this is the opportunity that I give to  
16 the lawyers to highlight anything they wish to highlight  
17 from their papers. I just want to emphasize, I know there  
18 are many, many arguments in the papers and you had a  
19 number of different submissions by Mr. Kenner and his  
20 earlier lawyer, as well as Mr. Seigel. And you don't have  
21 to repeat everything that's in the papers. I want  
22 Mr. Kenner to understand just because Mr. Seigel doesn't  
23 cover every single item that you and he and your prior  
24 lawyer raised in the papers doesn't mean I'm not  
25 considering it. It's a chance I give to lawyers not to

1 repeat everything that's in their papers, but to highlight  
2 anything they want to highlight to me in their papers.

3 So it's the defendant's motion, so I will let  
4 Mr. Seigel go first.

5 MR. SEIGEL: Actually, Judge, this motion was  
6 made pro se. Prior counsel had submitted what he  
7 considered to be a roadmap to it. But it was always the  
8 intention to have Mr. Kenner make the argument. And if  
9 he's then allowed to do that -- I've actually worked with  
10 him quite a bit over the last six weeks to get him in the  
11 position to do that, the help clarify his claims and help  
12 the Court locate where the documents are in his  
13 submission.

14 THE COURT: Okay. I'm just going to confirming  
15 with Mr. Kenner that he wants to do the argument himself  
16 for purposes of today's proceeding. Is that your wish,  
17 Mr. Kenner?

18 THE DEFENDANT: Yes, sir, your Honor.

19 THE COURT: Mr. Seigel, if there's anything that  
20 you want to submit after he's done -- Mr. Kenner, this is  
21 the same warning I give to the lawyers, I didn't know  
22 that you were going to do the argument yourself, but --  
23 and I don't know what you prepared today. I just don't  
24 want you to go through every single -- I'm going through  
25 every single argument when I decide this and address them

1 all. So don't feel like you have to go through every  
2 single word in your submission, do you understand that?

3 THE DEFENDANT: Yes, sir, your Honor, I  
4 appreciate your guidance.

5 MR. SIEGEL: Your Honor, Mr. Kenner is suffering  
6 from vertigo, so would it be okay if he sits.

7 THE COURT: Yes.

8 THE DEFENDANT: Thank you, your Honor. Your  
9 Honor, first you I'd like.

10 MS. KOMATIREDDY: Another thing, your Honor. I  
11 just need to give one moment caution. I wonder if the  
12 Court needs to advise the defendant as to his Fifth and  
13 Sixth Amendment implications of making a statements on the  
14 record in this context.

15 THE COURT: Yes. Let me just -- if you were to  
16 make certain factual statements, Mr. Kenner, those could  
17 be used against you. You understand that obviously to the  
18 extent that you're making some legal argument as a lawyer  
19 would, that would be one thing, but if you were to make  
20 certain statements of facts, you don't have any  
21 protection. You're representing yourself here. And if  
22 you make certain representations of fact, the government  
23 could seek to use that against you in some way. Do you  
24 understand that.

25 THE DEFENDANT: Yes, sir, your Honor.

1 THE COURT: Okay. Go ahead.

2 Obviously you have a right to have a lawyer do  
3 this, but -- a defendant has the right to represent  
4 themselves for the entire proceeding, or in this case just  
5 for the the purposes of this motion, but; you understand  
6 for you have the right to have an attorney do this  
7 argument for you, even though you prepared the papers you  
8 could have Mr. Siegel do it and one of the reasons why a  
9 defendant would choose to have a lawyer do it is to avoid  
10 some of these issues that the government just raised. You  
11 understand that?

12 THE DEFENDANT: Yes, sir, your Honor.

13 THE COURT: You want to argue it yourself.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Okay, go ahead. You.

16 THE DEFENDANT: Your Honor, first I'd like to  
17 thank the Court for the time today and also extend a brief  
18 apology for the Court and the prosecutors for my Rule 33  
19 submission in such an unconventional way. But as the  
20 Court knows, I was moving through attorneys at the time  
21 and couldn't get much guidance on that. So I just want  
22 the Court to know I did the best that I could in that  
23 context. And I'm forward to clearing up some of the  
24 voluminous reports, so if you please bear with me I'll try  
25 exhibit some brevity for the Court today as well, your

1 Honor. First what I'd like to do is, I'd like to just  
2 briefly address the newly discovered evidence issue. Then  
3 I would like to cover some of the prosecutorial misconduct  
4 issues that were raised briefly and known perjury that was  
5 allowed to stand uncorrected over and over throughout the  
6 the trial, and then I'd like to finish up, touch briefly  
7 on a few Brady violations that were highlighted with  
8 respect to Mr. Kaiser and some of the theft that was  
9 systematically withheld from the pretrial documents by  
10 Mr. Galioto. Under newly discovered evidence, your Honor  
11 Forfeiture 44 was a document that was submitted by the  
12 government during the forfeiture hearings and it was  
13 allegedly presented to the government about three weeks  
14 after the conclusion of trial in 2015.

15 That document, the majority of the discussions  
16 today I want to focus on that document and a few  
17 contradictory government witness testimony that was given  
18 years before the 2015 trial, proving that the document was  
19 not only in concert with my defense strategy and my  
20 defense testimony but it also contradicted the main  
21 government theories throughout the trial.

22 Forfeiture 44, as your Honor saw during the  
23 trial, was the spreadsheet presented by Mr. Jowdy and his  
24 attorneys post-trial confirming all of the Hawaii money  
25 that were sent to Mr. Jowdy from 2004 to 2006 were deemed

1 loans on Mr. Jowdy's books and records under the same  
2 premise that I presented them throughout trial as part of  
3 our defense.

4 Forfeiture 44 confirms that all of the Hawaii  
5 funds from the Little Isle LLC were sent to Mr. Jowdy as  
6 loans and it contradicted the government's main trial  
7 theme of the alleged theft of the Hawaii funds and  
8 Forfeiture 44 also contradicted the government's main  
9 claims that the Jowdy loans were made up and used as a  
10 cover-up and a finger-pointing scheme by both myself and  
11 Mr. Constantine.

12 Now that the loans effectively are true, Jowdy  
13 confirmed it post-trial to the government on Forfeiture 44  
14 and the government introduced it into evidence and I  
15 believe it creates a substantial reformatory effect on the  
16 government's trial theories. Throughout the trial the  
17 prosecution called the loans bogus, phony, purported, and  
18 they called me a liar for making those claims and that  
19 bell cannot be unrung even though that effectively has  
20 been the case, and now is substantiated by Forfeiture 44.

21 Second, I raise the issue that under new  
22 evidence there were 17 disclosure letters that were signed  
23 back in 2009 and turned over to Arizona attorney Tom Baker  
24 on behalf of all of the plaintiffs in the Arizona/Hawaii  
25 lawsuit against Mr. Jowdy.

1           Each one of the witnesses that testified at this  
2 trial testified that they were unaware of those loans to  
3 Mr. Jowdy, but in 2009 they all signed off on disclosures  
4 from Mr. Baker that the first paragraph of the seven page  
5 disclosure said the gist of the lawsuit is to recover  
6 certain monies loaned to Mr. Jowdy by Mr. Kenner, Little  
7 Isle IV and Ula Makika, Mr. Kenner estimated the total  
8 amount of the monies loaned to Mr. Jowdy which have not  
9 been repaid to be approximately \$5 million. This is the  
10 estimated principal only, exclusive of any accrued  
11 interest.

12           In summary, Mr. Jowdy denies be that the money  
13 were loans, but rather characterizes them as investments.  
14 His own document, Forfeiture 44, shows we were fighting an  
15 uphill battle against something that Mr. Jowdy proffered  
16 to the FBI months later, testified in a California  
17 deposition months later was actually loans and now through  
18 Forfeiture 44 confirms they are loans.

19           You can find Mr. Jowdy's confession of the loans  
20 at 3500 material KJ-2 at page 12 where he tells Mr.  
21 Galimoto that he in fact borrowed the money from Little  
22 Isle IV and Ula Makika and myself. He made those claims  
23 in 2010, five years before the government claimed that  
24 those loans were actually fake and made up.

25           Ultimately I received the Baker disclosures from



1 Mr. Constantine's attorney, Mr. Oliveras, months after the  
2 conclusion of the trial and that was the first that I had  
3 knew that any of those signed disclosures were actually in  
4 existence.

5 At trial I think we heard from Mr. Berard,  
6 Mr. Peca, Mr. Sydor, Mr. Rucchin, Mr. Goncher and Mr. Nash  
7 all deny that they knew there were loans to Mr. Jowdy  
8 although each one of them signed the disclosures that I  
9 found out about after trial. Apparently they didn't know.

10 And then last I wanted to address the Northern  
11 Trust subpoena documents that arrived, as your Honor  
12 knows, very late in the trial. These documents confirm  
13 that each of the line of credit clients knew that they had  
14 authorized me to withdraw the line of credit funds for  
15 deposit into Little Isle IV, the Hawaii corporate bank  
16 account; 2, that they were signing the Northern Trust  
17 deposits for their line of credit as a capital account for  
18 quote investments into Little Isle IV; 3, that they gave  
19 authorization to me to use the funds under the Little Isle  
20 IV operating agreement; and, 4, that they signed off  
21 annually to use those funds. As a example, Mr. Nolan, his  
22 2004 extension of credit called the money he borrowed an  
23 investment in Little Isle IV, \$2.2 million, and he signed  
24 that on October 29th of 2004.

25 Annually all of the investors signed

1 disbursement requests and authorization documents from  
2 Northern Trust, and they confirm that each of the  
3 investors knew at all times that their funds were used and  
4 in fact Mr. Nolan in 2005 signed his disbursement request  
5 that acknowledged that \$2.1 million had already been used.  
6 In 2006 he signed one that showed 1.3 million was used  
7 after he received over 700,000 back from our Lehman  
8 closing.

9 And then lastly, in 2007 Mr. Nolan also signed a  
10 document after he had a -- which was exhibit R 33480 in my  
11 submission, and he used my FedEx account to personally  
12 return that to Northern Trust Bank at R 33460. A five day  
13 text message conversation between myself and Mr. Nolan  
14 identify the documents, what they were for and why he  
15 needed to sign them, and ultimately Mr. Nolan signed them  
16 and sent them back. So when he told the arbitration panel  
17 in 2009 and this courtroom in 2015 that he had no  
18 knowledge of the line of credit, did not know it was  
19 signed and had never gave any permission for it, it was  
20 clearly under false pretense or clearly a misstatement.

21 Mr. Nolan then signed the 2007 distribution  
22 request and authoization which was exhibit R 30480, that  
23 identified the full \$2.2 million being used in his  
24 account. And despite the evidence of Mr. Nolan's  
25 signatures on almost 40 documents with Northern Trust, he

1 testified during trial at transcript 2065 and 2066 that he  
2 had no understanding or no knowledge of these whatsoever.  
3 At trial Mr. Nolan, Mr. Berard, Mr. Peca, Mr. Suder and  
4 Mr. Rucchin all testified contrary to the documents that  
5 were finally -- that finally arrived in Northern Trust  
6 package.

7           These are crucial documents, your Honor showing  
8 that each of these investors had full knowledge of what  
9 was going on with their funds, the intention of their  
10 funds, and annually the use of the funds.

11           We tried to obtain the records over a month  
12 before trial when the government objected to it, calling  
13 the subpoena burdensome and -- for Northern Trust, and a  
14 fish expedition meant to harass the alleged victims, but a  
15 week before trial they withdrew the objection and the  
16 subpoena went in to Northern Trust although it took 10  
17 weeks to arrive and it arrived after the close of the  
18 government's case. At that point we had asked Mr. Haley  
19 to re-call each of the witnesses, which we refused to do,  
20 to confront them with the documents. And all I would ask  
21 your Honor is for consideration, if you don't find the  
22 Northern Trust documents that fully disclose the use of  
23 the funds, the intent of the funds, on an annual basis for  
24 each of the Hawaii investors that are claiming losses,  
25 that they didn't know about, if you deem these to be not

1 new evidence because Mr. Haley had access to it but simply  
2 refused to use them properly at trial, I would ask the  
3 Court permission to be able to make a submission of  
4 ineffective counsel claim under the Rule 33, and it would  
5 take about 30 days to have that done, if your Honor would  
6 allow me to.

7 At this point, your Honor, I'd just like to go  
8 through a couple of other items. The government  
9 throughout the trial had called each of the  
10 representations of the loan by me and by defense counsel  
11 as bogus, phony and supposed. They also called the loan  
12 document that Mr. Jowdy had signed to borrow the funds  
13 back in 2009 "purported." Although they had in their  
14 possession throughout the trial Mr. Jowdy's own attorney's  
15 admissions of the document as an authentic document, his  
16 December 2010 Nevada trial defense where his own attorney  
17 Ms. Lee actually submitted it.

18 During the forfeiture hearing -- excuse me,  
19 your Honor, sorry about that.

20 Your Honor, we -- during the forfeiture hearing  
21 when we addressed the authenticity of the loan agreement  
22 that substantiated the loans that now Forfeiture 44  
23 corroborates, the government, when they argued with me  
24 over that point, I think we offered to present the  
25 transcripts from the Nevada trial, the transcripts from

1 Mr. Gaudet, the loan document witness, and Mr. Gaudet's  
2 testimony from the 2009 arbitration all substantiating the  
3 authentication of it. What I did was in our submission at  
4 R33 D as in David, in that file, all three of those are  
5 there and present for you to look up, your Honor.

6 In FORF-B, that is Mr. Gaudet's testimony in the  
7 Nevada trial, you can find his testimony at transcript  
8 page 197, 198, where he authenticates the document for Mr.  
9 Jowdy's defense. Forfeiture 44 was confirmed by Mr. Jowdy  
10 as real. But five years after Mr. Jowdy and his attorneys  
11 confirmed it, the underlying loan agreement as real, the  
12 government ignored it, contradicted it throughout the  
13 trial and call it fake, bogus, phony, and supposed, fully  
14 prejudicing the defense in all context.

15 The loans ultimately were specifically  
16 authorized through Little Isle IV through the operating  
17 agreement which you can find in R 33571 and also in my  
18 point 3 submission at page 21, and under the first section  
19 of the operating agreement it reads: At the sole  
20 discretion of the managing member Little Isle IV may  
21 participate as a lender if deemed by the managing member  
22 to be in the best interest of the LLC. I was the managing  
23 member at all times of Little Isle IV, your Honor, and I  
24 still am.

25 When the government allowed their witnesses to

1 claim no knowledge of the Jowdy loans they had to ignore a  
2 significant amount of contradictory evidence and this is  
3 where I begin to discuss some of the prosecutorial  
4 misconduct issues.

5 From Mr. Kaiser, in order for him to testify  
6 that he had no knowledge of the loans to Mr. Jowdy, the  
7 government had to ignore his 2009 arbitration testimony at  
8 R 33637 at point 3 at page 154 and 155. Mr. Kaiser's only  
9 relationship with the alleged trial schemes was his  
10 investment in Hawaii, which he was also the only person  
11 who was fully paid back in 2006, thus had no capital  
12 remaining in the investment, which you can see at R 33052.  
13 He received his full 1.176 million at the closing. And  
14 whether or not he chose to repay his friends and family he  
15 raised the money from was his own business or had nothing  
16 to do with myself or Little Isle IV, leaving Kaiser very  
17 difficult claim to be a victim at all from this.

18 He gave very substantial testimony in his  
19 arbitration in 2009, your Honor, and I think, you'll be  
20 able to find that in his arbitration testimony, let's see  
21 if I can be succinct in where you can find that.  
22 Mr. Kaiser did not give a very long testimony, it was  
23 probably seven pages of deposition. So perhaps I'll just  
24 leave it in your Honor's hands to be able to go through  
25 that without taking up the Court's time.

1           In addition to Mr. Kaiser in that arbitration  
2 testimony claiming not only did he participate in the  
3 decisions to raise money for Mr. Jowdy's loans, but after  
4 he realized that there was collateral and good collateral  
5 by Mr. Jowdy from the loan agreement that he had in his  
6 possession, he met with Mr. Jowdy on several occasions,  
7 after those meetings Mr. Kaiser raised about one million  
8 dollars from his friends and family. He testified to all  
9 of that and the reason that he raised that money was to  
10 contribute to Mr. Jowdy's 15 percent move.

11           And ultimately he had stated at one point the  
12 first thing Mr. Kenner told me, and I met Mr. Jowdy a  
13 couple of times, he seemed a big thing, it was 15 percent  
14 interest rate and I thought it was a good move.  
15 Mr. Kaiser also corroborates that 2009 arbitration  
16 testimony in October of 2010 in his 3500 material, in an  
17 interview with Mr. Galioto at JK-1-R.

18           Your Honor, this testimony by Mr. Kaiser and  
19 several others I'll mention in a moment all are  
20 prosecutorial misconduct because they not only were  
21 overwhelming testimony that contradicted their 2015  
22 courtroom testimony here that stood uncorrected at all  
23 times, but in many occasions like in Mr. Kaiser's, he also  
24 corroborated that testimony directly to FBI Agent Galioto  
25 in face-to-face meetings represented in FBI raw notes or

1 transcribed notes after the fact. Mr. Kaiser had given  
2 testimony about his money being stolen at transcript 983  
3 and also given erroneous testimony about an alleged  
4 confrontation in 2006 at transcript 1043. But three years  
5 later Mr. Kaiser was asked are you aware that Mr. Jowdy  
6 hasn't paid the money back? He says correct. Do you  
7 blame Mr. Kenner for him not paying the money back? He  
8 says no. He says that he's been dealing with a lot of the  
9 Hawaii investors for years and it's never been a secret  
10 that anybody was unaware of the loans, there were no  
11 secret handshakes. All that language in his 2009  
12 testimony is corroborated in his 2010 FBI interview, and  
13 none of it was corrected during the trial.

14 Mr. Kaiser's also present during Mr. Jowdy's  
15 2010 deposition in California when Mr. Jowdy finally  
16 admitted to all the loans in a public setting, and  
17 although he was there for, present for two days for  
18 Mr. Jowdy's confessions, which were also sent to Agent  
19 Galimoto.

20 Mr. Kaiser told this court he never believed  
21 Mr. Jowdy stole any of the money, which also contradicts  
22 the new evidence in Forfeiture 44 the the money was loaned  
23 to Mr. Jowdy and he's refused to pay it back for over 11  
24 years.

25 I'd like to have one second, your Honor.



1 (Pause.)

2 Your Honor, I apologize for the delay.

3 With respect to Mr. Kaiser, I'm also with  
4 Mr. Berard's testimony that he had given in 2009 at his  
5 arbitration fully corroborating his knowledge of the Jowdy  
6 loans. In each of these circumstances some of the  
7 government's most crucial witnesses at trial had made  
8 representations that -- and very definitive  
9 representations -- that they were unaware of any of the  
10 loans that were made to Mr. Jowdy at any point in time nor  
11 would they have approved any of them.

12 This fully contradicted the 2009 testimony in  
13 every action they had taken with respect to Mr. Jowdy and  
14 myself, until just prior to trial when they took a 180  
15 degree change in their approach to what they knew six  
16 years earlier.

17 Each one of these pieces of evidence,  
18 your Honor, had been in the government's hand and were in  
19 the government's hand for as many as six years prior to  
20 trial, and contradicted the government's main theories  
21 throughout the entire trial.

22 Forfeiture 44, which was admitted as new  
23 evidence during the forfeiture hearing by Mr. Wayne  
24 effectively corroborates that the loans to Jowdy today are  
25 worth over \$25 million to the Hawaiian investors and

1 nobody has attempted to recover them, especially with  
2 Mr. Kaiser and Mr. Berard working for Mr. Jowdy and me  
3 being unable to pursue those legally any longer.

4 If -- Mr. Berard's testimony during the '09  
5 arbitration was incredibly short as well, but it was  
6 specific and to the point that Mr. Berard was clearly  
7 aware of the Jowdy loans and approved them. In fact in  
8 2010 Mr. Berard continued to work hand in hand with myself  
9 and the attorneys to pursue Mr. Jowdy for those unpaid  
10 loans, and had some confrontations with some of  
11 Mr. Jowdy's people in order to substantiate the fact that  
12 he was not going working with Mr. Jowdy but with all of us  
13 until later in 2012 when Mr. Kaiser and Mr. Berard ran  
14 into their own financial troubles.

15 Mr. Peca was a very crucial witness for the  
16 government in the same context. In 2011, your Honor,  
17 there were three Southern District of New York grand jury  
18 testimonies. Mr. Peca gave his, which can be found at  
19 R 33419 and at point three in my submission, pages 20 to  
20 23, where Mr. Peca specifically outlined his investment in  
21 Little Isle IV to the Southern District grand jury four  
22 years before this trial. He outlined his knowledge of the  
23 loans to Mr. Jowdy to the Southern District grand jury.  
24 He acknowledged his complete cooperation in the loans and  
25 his knowledge that they were made and his support for

1       them. He acknowledged all of the money from his Capital  
2       account going to Mr. Jowdy.

3               So ultimately through his Southern District  
4       testimony, he confirmed that he expected \$1.7 million from  
5       this Hawaii funds to be in Mr. Jowdy's loan amount,  
6       although it was far less than that amount.

7               The government had to ignore Mr. Peca's Southern  
8       District testimony in order to allow him to say at the  
9       trial here that he had no knowledge of it. And if it's  
10      based upon faulty memory, confusion and mistakes, it  
11      certainly makes his 2015 testimony unreliable, as the  
12      government proffered during their rebuttal to my Rule 33  
13      submission.

14              Mr. Peca, his primary involvement with the case  
15      here in New York was with respect to his use of funds from  
16      the Little Isle IV line of credit. There was testimony  
17      also by Mr. Sydor and Mr. Stephenson at the same Southern  
18      District trial. Although Mr. Stephenson didn't testify  
19      here, Mr. Sydor did, and he again did cooperate that he  
20      had full knowledge in 2011 of the loans to Mr. Jowdy and  
21      the Capital account uses from the Hawaii business.

22              He also corroborated that the money was not --  
23      was no longer his, but it belonged to the corporation.

24              Your Honor, again for each of those that I have  
25      represented, the government had full access to each of

1 these individuals. They had all of this evidence in their  
2 hands and in their possession for years before they made  
3 the claims that nobody knew that there were loans to  
4 Mr. Jowdy from our Hawaii project as being the fraud in  
5 the case. And as a result of the government allowing each  
6 of these crucial witnesses to take the stand and testify  
7 in contradiction to previous testimony that they had full  
8 access to and the ability to go over and over with these  
9 witnesses in preparation it exhibits pure signs of  
10 prosecutorial misconduct by the government for allowing  
11 these contradictory testimonies to be made when they were  
12 made in very substantial ways to previous civil and grand  
13 jury trials.

14 Ms. Komatiriddy during her opening remark at  
15 transcript 31 actually made it very clear to the Court  
16 that the alleged loans to Mr. Jowdy is where the fraud  
17 occurred where the defendants lied to the investors about  
18 who was stealing from them and find a way to steal from  
19 them all over again, referring to the global settlement  
20 fund. According to Forfeiture 44 there was no lie and  
21 there were no prior thefts and ultimately with all of that  
22 being real, the global settlement was a fund that  
23 Mr. Constantine conceived and all of us agreed to  
24 contribute to in order to pursue Mr. Jowdy in additional  
25 lawsuits to the approximate 10 that were already pending

1       versus him at that point in time.

2               Your Honor, if I can just have one second can  
3       just to get a drink of water, please.

4               Your Honor, again I apologize for the brief  
5       delay.

6               In fact in point three on pages eight and nine I  
7       pointed out about 12 different instances that Mr. Jowdy  
8       had stolen from myself and the rest of the Mexican  
9       investors. Some of them were so egregious they couldn't  
10      be ignored by the government. Again with evidence that  
11      they had in their possession since Mr. Jowdy's grand jury  
12      had begun through Mr. Galioto back in 2009.

13              So even the government's representations that  
14      the loans to Mr. Jowdy were fake, that they were cover-up  
15      and it was part of a finger-pointing scheme, again  
16      exhibits pure signs of prosecutorial misconduct as they  
17      ignored the evidence that they had in their hand to frame  
18      a prosecutorial theory that had no foundation.

19              Mr. Jowdy had also proffered directly to FBI  
20      agent Galioto in March of 2010, and in that proffer in  
21      3500 material KJ 2 at page 12 he confirmed all of the  
22      loans. So it's possible in my perspective that  
23      Mr. Miskiewicz and Ms. Komatiriddy were unaware of some of  
24      this evidence since all of this was given directly to  
25      Mr. Galioto at all times.

1           The evidence that Mr. Jowdy had stolen  
2       somewhere in the neighborhood of \$25 million was all  
3       represented by myself to Mr. Galioto back in June of '09  
4       and it's all substantiated in point 3, pages eight and  
5       nine, but in addition, just one piece of evidence I'd like  
6       to point out, your Honor, is that just a week before the  
7       trial, in one of my submissions in my timeline 012, the  
8       government had subpoenaed Mr. Jowdy's August 2002 Baja  
9       Development Corp. bank record which was his personal bank  
10      account. They received that one week before trial, and  
11      that bank account statement substantiates that Mr. Jowdy  
12      stole over \$400,000 of the first 800,000 that myself,  
13      Mr. Wooly and Mr. Cristich deposited with Mr. Jowdy, so  
14      it's highly improbable that the government received that  
15      subpoena the week before trial and when they received it,  
16      they chose to ignore it and then call all the money that  
17      Mr. Jowdy took from us cover-up, fake loans and  
18      finger-pointing by me.

19           The myriad of other steps by Mr. Jowdy run the  
20      gamut but they certainly culminate with north of \$25  
21      million worth of equity and unpaid loans that he's refused  
22      to pay us back for over 11 years, and is the basis for  
23      nearly 15 lawsuits that were filed by myself and all of  
24      the plaintiffs and many of the a government's alleged  
25      victims throughout the trial to recover those funds.

1 Without me involved in that litigation, approximately six  
2 of those lawsuits folded in 2013 after I was arrested at  
3 the hands of Mr. Galioto with Mr. Kaiser and Mr. Berard's  
4 help.

5 Your Honor, ultimately under prosecutorial  
6 misconduct I would like the Court to know that I recognize  
7 that the government does not commit prosecutorial  
8 misconduct every time a witness testifies on the stand in  
9 contradiction to what they previously stated yet at a  
10 certain point, when government is in possession of so much  
11 evidence, including prior statements and other supporting  
12 real evidence, then the government has an obligation  
13 either to present it or to correct it when it occurs.

14 If they choose to present it, then, your Honor,  
15 it does cross the line into prosecutorial misconduct, and  
16 in this instance this is the case. Notwithstanding the  
17 previously mentioned and ignored Jowdy loan and line of  
18 credit usage knowledge from previous Northern Trust  
19 documents and the late submission of the Northern Trust  
20 documents at trial, in a one occurrence of misstatements  
21 on a minor trial issue could be deemed harmless, but when  
22 every crucial government witness provided egregious  
23 misstatements and he the government called them faulty  
24 memory, confusion and mistakes, they never called them the  
25 truth. It must be addressed as to when they acquired the

1 knowledge of these misstatements before, during or  
2 afterwards, but nonetheless, none of that evidence put on  
3 by the witnesses can be deemed as reliable in 2015  
4 contradicting every bit of evidence that the government  
5 had in their hands ahead of time.

6 Your Honor, under Brady there were two documents  
7 that I would just like to briefly touch on. One document  
8 Mr. Kaiser had about 15-page signed agreement with his  
9 friend Mr. Nick Privitello who testified here at trial.  
10 That document allowed Mr. Kaiser to receive funds from  
11 Mr. Privitello as the managing member of an entity in  
12 Mexico known as Los Fralies, which was mentioned a myriad  
13 of times during Mr. Privitello's testimony in 2015.

14 Mr. Kaiser was never the managing member of that  
15 entity nor did he have any authority to ever sign a  
16 subscription agreement with Privitello or anybody else.  
17 In pretrial, there were dozens and dozens of documents  
18 turned over from Mr. Privitello related to the Los  
19 Frailies project, but systematically this one signed  
20 agreement was withheld by Mr. -- by someone from the  
21 government and not given to us at that point in time.

22 Second, which I referenced in the Brady  
23 material, was that Mr. Kaiser, excuse me, Mr. Galioto had  
24 received a fax statement in 2014 from one of Mr. Kaiser's  
25 investors, Dr. Frank Sconzo. That fax was also



1 systematically removed from the other pretrial evidence  
2 that was turned over to the defense. And it's only three  
3 pages, but it corroborates that Mr. Galimoto had the  
4 evidence before the trial, because of the fax cover page,  
5 and it also substantiates that Mr. Kaizer stole \$190,000  
6 in one check and \$10,000 in another check from Mr. -- from  
7 Dr. Sconzo. Somehow some of that money is represented in  
8 the government's forfeiture one to me as funds that I  
9 received when they were clearly cashed and deposited to  
10 Mr. Kaiser's account. If I can have one second,  
11 your Honor, then I'll be able to wrap up for you.

12 The two documents that I just represented,  
13 your Honor, were turned over on disks in -- prior to the  
14 forfeiture hearing. They were -- one of them was on  
15 victim-Nick Privitello, the file, and second one for  
16 Dr. Sconzo was under the file name Victim-Frank Sconzo and  
17 Willy, at page 15 through 17. These pages if they were  
18 not a critical flaw in Mr. Kaizer's specific integrity I  
19 find it hard to believe that Agent Galimoto would not have  
20 removed it from the rest of the documents in the Sconzo  
21 file and the Privitello files that were turned over  
22 pretrial. Otherwise he could have turned over all of them  
23 or none of them to us. But had we learned about these we  
24 certainly would have been able to address Mr. Kaizer's  
25 integrity specifically about this, and we would have had

1 the opportunity to call Dr. Sconzo with respect to Mr.  
2 Kaizer's integrity cashing checks with these forged  
3 contracts. We also believe -- excuse me, I also believe,  
4 your Honor, that Dr. Sconzo and another victim of  
5 Mr. Kaizer's, John Smith who is a friend of his and  
6 unknown to me for the mostpart also have signed agreements  
7 that we were unaware of and we didn't realize there were  
8 any signed agreements until we saw the Privitello disk  
9 about six months after the trial.

10 Your Honor, these acts are not just bad acts by  
11 Kaizer, but rather attack the credibility of Mr. Kaizer's  
12 honesty with his friends and family. They involve  
13 dishonestly, deceit and fraud known to the government  
14 concealed from the defense systematically. In fact  
15 Mr. Kaiser's credibility is crucial to all of the counts  
16 in the indictment counts in the indictment as he was one  
17 of my closest associates from 2002 to the time of the  
18 indictment. While Mr. Kaizer was simultaneously acting  
19 outside the scope of my knowledge utilizing my managed  
20 projects to repeatedly steal from his friends and family.

21 In fact counts 2, 3 and 4 were based on alleged  
22 unpaid debts by me to Mr. Kaiser that were also proven  
23 false through Mr. Kaiser's own bank records that were in  
24 the government's possession which you can see at exhibit  
25 exhibit R 33 B.

1           With Mr. Kaizer fully repaid as I mentioned from  
2     the Hawaii project and fully repaid from the California  
3     projects, Mr. Kaizer was due no money from me for any of  
4     the related or unrelated charges in this case and counts,  
5     2, 3 and 4 were represent by Mr. Miskiewicz to the Court  
6     at transcript 1020 to be the sole reasons for counts 2, 3  
7     and 4, which were the only venue ties I believe to the  
8     Eastern District.

9           When discussing the credibility -- when  
10    discussing the government's failure to turn over the  
11    material that undercut Mr. Kaiser's credibility, it's  
12    one thing if Mr. Kaizer was a drug dealer in an unrelated  
13    matter to anything that was in front of the 2015 court,  
14    but when Mr. Kaizer is engaged in wire fraud, specifically  
15    including fabrication and forgery of documents to support  
16    his own thefts from his own friends and family, it  
17    addresses his complete willingness to commit crimes,  
18    deceit and fraud which directly goes to his credibility.  
19    Those documents would have helped us present that to the  
20    jury.

21           The government argued that this evidence was not  
22    material during their reply to my Rule 33, but to the  
23    contrary, these are not simply bad acts by Kaizer, they go  
24    specifically to Kaiser's engagement of dishonestly, deceit  
25    and fraud which go directly to his credibility as a

1 witness, deceiving his own friends and unknown to me.

2 Your Honor, the government's response to all of  
3 the allegations of perjury by me throughout my Rule 33  
4 submission, which could be deemed misstatements by the  
5 witnesses, their only response is faulty memory, confusion  
6 and mistakes. These are not just misstatements on  
7 peripheral issues, your Honor, they are the crucial issues  
8 in this case. Whether the investors were aware of how  
9 their investments were used and if they approved it,  
10 instead the government claimed the statements were all  
11 based upon faulty memory, confusion and mistakes. Yet in  
12 the government's Rule 33 reply, the government never says  
13 that their witness statements are true. They never  
14 corrected the statements during trial and in fact the  
15 government relied on all of those statements for their  
16 summation.

17 In the government's reply, they do not claim at  
18 any point that their witness statements were true during  
19 trial, yet the government did nothing to bring these  
20 misstatements on every crucial fact to anyone's attention  
21 and in fact they continued to rely on their overwhelming  
22 misstatements during their summation and through their  
23 Rule 33 reply and their request to deny my Rule 33 in its  
24 entirety. That's why this particular case it does cross  
25 the line, your Honor, into prosecutorial misconduct.

1           With a response of faulty memory, confusion and  
2 mistakes, your Honor, I believe the government has more of  
3 an obligation to correct the record for the Court. The  
4 government has failed to correct the mistakes made by  
5 their witnesses and that they are not disputing. Thus,  
6 the government is relying on the statements that are  
7 wholly unreliable and violating my constitutional rights  
8 to a fair trial and proceeding.

9           Your Honor, unless there are any questions for  
10 me, I think that's enough for today, and I think the  
11 voluminous papers are plenty for the Court to review.

12           THE COURT: The only question I have, some of  
13 these things that you refer to, it's my memory that these  
14 things were covered during the trial, that you had  
15 materials, like for example, the prior grand jury  
16 testimony that you're saying was inconsistent. That's not  
17 something that you learned about after the trial. That  
18 was part of of the 3500 material of the witnesses, right,  
19 like Mr. Peca.

20           THE DEFENDANT: Yes, sir, your Honor, those  
21 documents were delivered to us in pretrial. But --

22           THE COURT: And they were questioned, I believe  
23 there being questioning about their prior statements in  
24 the grand jury, right?

25           THE DEFENDANT: There were some questions to.

1 Mr. Peca, not to Mr. Sudor, but there was to Mr. Peca  
2 about his grand jury testimony. But, your Honor, I think  
3 the government carries a much larger obligation than to  
4 allow their witnesses to turn over=, excuse me, to proffer  
5 through endless misstatements to the Court and they are  
6 somehow let off the hook by simply turning over what they  
7 know are planned, perjured or misstatements throughout the  
8 trial. Just because they deliver voluminous pretrial  
9 evidence to the defense I don't think relinquishes the  
10 government from their obligation to not put on faulty  
11 testimony through their witnesses, and when effectively  
12 the witnesses if it were not planned with the government,  
13 if the witness did speak in direct contradiction to prior  
14 testimony, I believe the government also carries the same  
15 obligation to make sure it's corrected and at a minimum  
16 raise that issue at a sidebar to your Honor so the Court  
17 can decide on how to deal that at the time.

18 THE COURT: These transcripts of the  
19 arbitration, when and how did you obtain that? You're  
20 saying that was obtained after the trial.

21 THE DEFENDANT: No, sir. Those were also  
22 obtained before trial. But those statements are in as  
23 much a grave contradiction to what Mr. Kaiser and  
24 Mr. Berard's main theme has been since they joined  
25 Mr. Galimoto's efforts two years before my indictment.

1 THE COURT: But that's not quote/unquote new  
2 evidence then.

3 THE DEFENDANT: No, sir, I was representing  
4 that, and I apologize to the Court, but I was representing  
5 that as prosecutorial misconduct knowing that the  
6 government had that and they were more than just  
7 substantial exculpatory pieces of evidence, but they went  
8 to the core elements of the government's theory in direct  
9 contradiction.

10 THE COURT: Okay. Let me hear from the  
11 government.

12 MS. KOMATIREDDY: Your Honor, the government  
13 has addressed each one of Mr. Kenner's arguments in its  
14 briefing. We rest on that briefing. I will only add, to  
15 the extent that Mr. Kenner claims that we don't stand by  
16 our witnesses statements, let me make it very clear for  
17 the record, we believe the government witnesses testified  
18 truthfully, we pursued the truth in good faith at trial,  
19 and I think the trial transcript reflects that. It  
20 reflects that on multiple occasions me and Mr. Miskiewicz  
21 examined the witnesses in good faith and raised with them  
22 exhibits, grand jury testimony and documents to explain  
23 statements that they had made in the past.

24 We did that on direct, we did that on redirect.  
25 If the Court has any questions, I'm happy to answer them.

1 THE COURT: The only question, I mean Mr. Kenner  
2 obviously takes the position as he did during the trial  
3 with respect to the Mr. Jowdy that these were loans. He  
4 claims that the new evidence, including Forfeiture Exhibit  
5 44 proved conclusively that they were loans and my  
6 question to you is is the government's position changed  
7 with respect to that regarding any evidence that has been  
8 uncovered since the trial?

9 MS. KOMATIREDDY: No, your Honor. The  
10 government's position hasn't changed with respect to that.

11 Forfeiture 44 is a document that is an Excel  
12 spreadsheet. That document -- and the brief lays this  
13 out, but I will go back through it again in detail, that  
14 document is, by Mr. Kenner's own admission, not new in  
15 information that it presents. Because as Mr. Kenner just  
16 explained, according to him the notes of Mr. Galimoto's  
17 interview and in 3500 KJ 2 already provide a so-called  
18 confession of loans. There was testimony in a California  
19 case in 2010, and there's multiple statements that  
20 Mr. Kenner claims show that there was a loan to Mr. Jowdy.  
21 All of these statements which he cites at length in his  
22 own Rule 33 motion were available to Mr. Kenner at trial,  
23 and through pretrial discovery. They were raised during  
24 the trial. All of them, including Forfeiture 44 are  
25 inadmissible hearsay, and in order to get any of that



1 evidence or those statements in and have it authenticated,  
2 Mr. Kenner would have had to call Mr. Jowdy or Mr. Gaudet.  
3 He was free to do that at all times, as was  
4 Mr. Constantine. Both chose as a strategic matter not to  
5 call those witnesses. So to the extent that Mr. Kenner  
6 now argues that there is evidence this is available to him  
7 that was not before, that is not true, because the  
8 evidence to the extent that he could have gotten it in at  
9 trial was always available to him. He was always free to  
10 call Mr. Jowdy and free to call Mr. Gaudet as to whether  
11 or not there was a loan.

12 That being said there's even more reason to  
13 disregard this argument because we're getting into the  
14 weaves of the relationship between Mr. Kenner and  
15 Mr. Jowdy, which is the very distraction that Mr. Kenner  
16 has pushed throughout the fraud and throughout the trial.

17 At the end of the day, the victims testified  
18 that they did not authorize their money in the Hawaii  
19 investment to be used for anything other than the Hawaii  
20 investment, and not even for a loan to Mr. Jowdy. That is  
21 the misrepresentation. That is the fraud and the  
22 diversion of proceeds. It flows from the fact the victims  
23 were told their money would be used for Hawaii. Now,  
24 Mr. Kenner claims there's a Little Isle IV operating  
25 agreement that allows him to use money however he sees

1 fit, and that there were certain authorizations in the  
2 Northern Trust documents that allow him to transfer money  
3 from the lines of credit to the Little Isle IV account.

4 As an initial matter, the operating agreement  
5 and the authorization came in at trial. They didn't come  
6 in at the tenth week. The government put in the  
7 authorizations at the outset of the trial by stipulation  
8 and we went through one of them with the witnesses, with  
9 one of the very first witnesses, Mr. Peca, to describe the  
10 nature of the authorization and what from a victim's  
11 perspective what he believed he was authorizing and what  
12 he did believe he was authorizing.

13 It is very clear from that that the victims  
14 believe that their authorizations based upon their oral  
15 conversations with Mr. Kenner's and Mr. Kenner's  
16 explanation to them of the investments and the purposes of  
17 the line of credit and the investments was that the money  
18 for Hawaii would be used for Hawaii and nothing else.

19 I will note it was brought to my attention this  
20 morning that yesterday the Second Circuit decided a case  
21 United States versus Weaver, in which it noted in the  
22 context of a wire fraud case that contractual disclaimers  
23 do not render oral representations immaterial.

24 So regardless of the exact text or any  
25 disclaimer in the Little Isle IV operating agreement, Mr.

1 Kenner's oral representations to the victims which the  
2 victims testified about were material and were material  
3 misstatements.

4           The jury had the opportunity to consider all of  
5 this, they had the opportunity to consider all of the  
6 Northern Trust documents, the Northern Trust documents  
7 didn't just come in in the tenth week of trial as we laid  
8 out in our trial, all of those documents were available  
9 for Mr. Kenner. They were produced in the production of  
10 the documents recovered from Mr. Kenner's home, they were  
11 produced in the production of the documents recovered from  
12 Mr. Kenner's computer, they were produced in the  
13 production of the subpoena response that Northern Trust  
14 gave to the government. And then a fourth time when there  
15 was another subpoena response, there were wholly moved in  
16 at trial, Mr. Kenner testified about them at length, the  
17 authorizations, extensions of credit, everything that he  
18 describes. And the jury had them with them during  
19 deliberations.

20           That's the long answer to your question, sir,  
21 but in essence, our position has not changed. We believe  
22 that the addition of one document to a pile of evidence  
23 that already was available to the defendant and a pile of  
24 evidence that were already available to the defendant,  
25 many of which he made through cross-examination, through

1 his own lengthy testimony and in closing arguments, does  
2 not change the picture here and does not require or  
3 warrant a new trial.

4 THE COURT: Okay. I'm going to to reserve  
5 decision on the motion. I'll be issuing a written  
6 decision. Mr. Siegel, if you want to order a copy of this  
7 transcript so you can provide it to the court, Mr. Kenner  
8 made a number of citations to the record, to his  
9 submission, I'm sure they're in his written submission as  
10 well, but if you want to provide that, obviously it will  
11 be available for any appellate review, I'm authorizing  
12 pursuant to CJA.

13 Do we have another conference scheduled?

14 MR. SEIGEL: I believe we do have something in  
15 July.

16 THE COURT: I thought we did, too. I wanted to  
17 make sure we have something in place.

18 MR. SIEGEL: I do have my calendar July 18th at  
19 one. And the Rule 33 motions for the codefendant. I note  
20 there was a motion for an extension for the defense on  
21 that motion yesterday. So I don't know if that date is  
22 going to hold but that's the next date.

23 THE COURT: I think we were trying to keep that  
24 date. I don't remember how long the extension it was.  
25 For present purposes I'm keeping that date. All right.

1 Thank you.

2 MS. KOMATIREDDY: Thank you, Judge.

3 (Matter concluded.)

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